UNITED STATES CIRCUIT COURT OF APPEALS,

NINTH CIRCUIT.

No. X8

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

ASA M. HAMILTON, DEFENDANT IN ERROR.

BRIEF FOR THE PLAINTIFF IN ERROR.

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H. S. CROCKER COMPANY, S. F.

IN THE

United States Circuit Court of Appeals,

NINTH CIRCUIT.

SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

vs.

ASA M. HAMILTON,
Defendant in Error.

Brief for the Plaintiff in Error.

Before proceeding to a discussion of the legal principles involved in this case, we propose to make a brief epitome of the facts contained in the record, which were undisputed at the trial, and which are predicated mainly, and so far as they are material, upon the evidence of the defendant in error, and the witnesses called by him to maintain the issues upon his part.

It was shown by the undisputed testimony that, upon or about the 24th of January, 1889,

the defendant in error purchased from a ticket broker (or scalper) in Denver, Colorado, the ticket, a photographic copy of which appears in the transcript on page 27, for which he paid the sum of about sixty dollars; that this ticket upon its face contains a contract requiring the signature of the purchaser, and witnessed by the selling agent; but, while it contained the signature of the selling agent at Omaha, it was not signed by the purchaser, and when it reached the possession of the defendant in error, through the ticket broker at Denver, it contained only the signature of the Omaha agent, with a blank space intended for the signature of the party to whom it might be sold. With this ticket in his possession the defendant in error proceeded upon his journey westward, reaching the eastern terminal of the railway line of the plaintiff in error, at the city of Ogden, about eleven o'clock P. M. on the night of January 25, 1889. At this point he was notified by one of the agents of plaintiff in error that he would have to sign the ticket, and unless he did sign it he would have trouble with the conductors. He replied, "That " remains to be seen in the future," and thereupon went to bed.

See Evidence of Hamilton, transcript p. 22.

The next morning, after the defendant in error had arisen, the conductor upon that division, Mr. Luty, informed him that he must either sign his ticket or pay his fare, as the ticket could not be punched by him unless it contained his signature (as those were his orders), and requested him to sign it, and threatened, if he did not sign the ticket or pay his fare, that he would have to put him off; but the defendant in error did not sign the ticket, and the conductor did not attempt to remove him from the train.

See Testimony of Hamilton, transcript, pp. 22, 23.

The conductor on the next division was Mr. Case. The division extends from Wells to Winnemucca. He requested the defendant in error to sign the ticket or pay his fare, or he would be compelled to put him off the train; and this request was repeated several times, and finally he exhibited a telegram, signed T. H. Goodman, which read, "Use passenger as if he had no "ticket." The conductor said, "You see these "are my orders; I will have to put you off." To which Hamilton replied, "I don't think you "can or will." The conductor asked him several times after that if he was going to sign,

and finally the train arrived at Winnemucca, the end of that division, where Conductor Case left the train.

See Testimony of Hamilton, transcript, p. 23.

" Conductor Derbyshire took charge of the train " at Winnemucca; he came to me in about the " manner of the rest, sign this ticket or he would " put me off, only he was a little more constant, " and finally he said: 'Come now, ain't you going " 'to sign this ticket? Come on now and sign it. " 'Why won't you?' I said, 'I don't want to.' He " said, 'You had better sign it.' I said, 'Don't " 'bother me any more. I can't write.' He said, " 'Let me sign it.' He had the ticket in his hand, " and I replied: 'No, you have no right to sign " 'my name; if you do I will have you arrested for " 'forgery.' He said, 'Suppose I keep this ticket,' " and made a motion to put it in his pocket, when " I replied: 'If you do I will have you arrested " 'for highway robbery; that is my piece of prop- " 'erty;' whereupon he handed it back to me. " Sometime afterward Derbyshire came to me and " said, 'Now go and put on your shoes, because I " 'am going to put you off at the next station;' " and thinking he might do so I changed my slip- " pers and put my shoes on.

" When we ran into the next station Derbyshire " and a brakesman came, and he said, 'Are you " 'going to sign this ticket?' And I said, 'No.' " He ordered the brakesman to take hold of me,

" and one grabbed on one side and one on the
" other, each with one hand on my neck and the
" other on my wrists. I grabbed the rail on the
" side of the car, and put my toes under the heater,
" and they pulled on me for four or five minutes,
" but they could not release my hold. He [meaning
" the conductor] said to the brakesman, ' Go and
" ' get the rest of the trainhands, and we will get
" ' him off.'

" As he said this (I was sitting at the time) I
" reached over and took a pistol from my valise,
" and climbed upon the back of the seat, between
" the curtain rail and the top of the car, threw
" my arm over the curtain rail, with the pistol
" pointing to the ceiling, and took hold of the
" curtain rail with my other hand. In the mean-
" time the rest of the trainhands came to the door,
" one with a jumper, and the other had on blue
" overalls. I thought they were trainhands. I had
" my gun pointing at the ceiling. I said, ' I don't
" ' want any of you men to bother me. I have a
" ' right here, and I want you to keep away from
" ' here, or probably you will get hurt. I have been
" ' worked up and bothered until I don't know
" ' hardly what I am doing; now keep away,' or
" words to that effect. That is about what it
" meant, but may not be the exact words."

See Testimony of Hamilton, transcript, pp. 23, 24.

" After they left the car everything was quiet
" until the train ran into Lovelocks. I remained
" upon the back of the seat until they left the car;

" and I then got down and put my pistol on the " floor of the car, under my seat, but at the sug- " gestion of a passenger I got it and put it in the " waistband of my trousers.

" There was nothing happened, more than in " any other car, until we got to Lovelocks; then " two men came to the door of the car, and the car " inspector was behind them. They turned and " looked at him, and he nodded his head that way " [showing], looking towards me. I did not hear " what he said. They made a spring and grabbed " me, and snapped on a pair of handcuffs. I pro- " tested all the time, and said, ' Gentlemen, I am " ' not going to make any resistance, and there is " ' no need of these handcuffs.' When I saw the " handcuffs I supposed they were officers. I said I " was not going to struggle. They searched me, " but did not find my gun, which they said they " were looking for. I said, ' Here it is,' and pulled " up my vest and showed them where my gun was. " They said, ' Go on,' and they drove me off ahead " of them. One was Eugene Cozzens, and the man " with him had firearms, which he held down; he " had his hand partially out of his pocket, and the " gun pointing into the pocket. As I was going, " some one put my overcoat over my shoulders, as " it was a bitter cold night. They took me over to " the store and postoffice. I do not know the name " of the firm, but Cozzens was there, I know. They " took me over there ironed. The store was full of " people, being the U. S. postoffice, and I felt rather " mortified to be ironed in a public place. I was " probably half or three-quarters of an hour at the " store. I asked Mr. Cozzens to take the irons off,

" and he said, 'We will keep them on awhile.'
" Finally he took them off, and we went from there
" to the Justice's Court. The Justice came, and my
" bonds were fixed at $1,000.

" The complaint was sworn to by Mr. Donlan,
" the agent of the defendant at Lovelocks. When I
" was arrested I was on my way to Portland, Oregon,
" to settle my father's estate. I was detained five
" days by reason of the arrest. I was compelled to
" telegraph for money to pay my fare to San Fran-
" cisco and pay my expenses at Lovelocks. I was
" discharged by the Justice on examination."

See Testimony of Hamilton, transcript, pp. 25–28.

Upon cross-examination Hamilton testified:

" Mr. Luty was very gentlemanly in his deport-
" ment towards me, as far as a man could be under
" the circumstances. He spoke in a loud tone of
" voice, the same as a man in every-day conver-
" sation,—the same as you and I are talking now.
" I did not say to any of these conductors that I
" did not have funds with which to pay my fare.
" That was not my reason for declining to pay fare,
" but because I considered I was not required to
" do it.

" When I met Mr. Derbyshire, his opening con-
" versation was about the same as the others,—that
" I would have to sign the ticket, pay fare, or get
" off. If I did not, they would put me off. Do not
" know exactly that Mr. Derbyshire approached me
" as a gentleman. He was a little more demonstra-
" tive than the others; still he did not do anything

" ungentlemanly, until he grabbed me and tried to
" throw me off, and that I did not consider very
" gentlemanly. He gave me warning that, if I did
" not sign when he came to Rye Patch he would
" have to put me off. At the next station he at-
" tempted to put me off, and he and the brakeman,
" and were unsuccessful, and they used a good deal
" of force, but they did not use sufficient force to
" expel me from the car, and I do not think they
" could, as I am a pretty strong man. They finally
" gave it up and sent for more help. While they
" were away for assistance I got out my six-shooter.
" I did not drive them from the car. They stood
" in the car until they got ready to leave. I did
" not have the pistol leveled at them. I had it
" pointed at the ceiling of the car, because any one
" who knows how to use a pistol will never point it
" at the object they are going to use it on, until the
" time arrives. I wanted to have my feet as near
" the level of their heads as I could get them. I
" could have stood off five or six men in that posi-
" tion. Derbyshire left the car casually,—did not
" run out. I do not think they were frightened
" very badly. I did not see anything more of the
" conductor until I was arrested. When I was ar-
" rested I did not see Derbyshire there. He was
" away attending to his business, I suppose, on the
" platform."

See Testimony of Hamilton, transcript, pp. 31–33.

Eugene Cozzens, a witness upon the part of the plaintiff (defendant in error), testified that he was

an officer at Lovelocks; that on the night of the 26th of January, 1889, Mr. Donellan, the railroad agent at that place, showed him a telegram from J. H. Whited, Division Superintendent, reading as follows: "Agent, Lovelocks: Conductor Derbyshire, "on No. 4, wires me that a man on his train has "drawn a six-shooter on him. Have an officer on "hand when No. 4 arrives.

[Signed] "J. H. WHITED."

"Donellan told me that there was a man on the "train they wanted me to take off, and at his re- "quest I went on board. I took Tefner with me to "help me. I asked Mr. Derbyshire, the conductor, "to point the man out to me, but he was a little "timid and would not do it. He said he was afraid "to go in the car; he said the man was a little wild, "and I believe the car inspector pointed him out. "I arrested Hamilton and took him over to my "store. I don't think the handcuffs were on him "more than twenty minutes. I then took him over "to the Justice's Court, which is a little room in "front of the jail. Don't think it was half an hour "before I got the warrant,—may be a little more or "a little less. Judge Pitt issued the warrant, and "Mr. Donellan swore to the complaint."

See Testimony of Cozzens, transcript, pp. 40–44.

Upon cross-examination he testified that he supposed Donellan came to him because he was an officer. "I knew nothing about any trouble over a "ticket. I took him off the train because he had "drawn a weapon or pistol or six-shooter on the

" conductor, as I was told. When I was told about " this the train was in sight, and only stops three " or four minutes. I would not have had time to " file a complaint and have a warrant issued before " the train left." He further testified that Derbyshire was afraid to go and point Hamilton out, and told him he was wild and had a pistol about that long [showing about on foot]; and " He said his " eyes were sticking out like that, and I was a little " frightened myself, and I went off and heeled my- " self, and went in and arrested him. Derbyshire " also told me to look out for him. It was for that " reason that I secured assistance to make the ar- " rest, and I put handcuffs on him for the reason " that I was afraid he would pull his pistol on me, " and make me run. I also believed him to be a " desperate man. I did what was done as an offi- " cer, and his removal from the train by me had " nothing to do with any ticket at all."

L. M. Donellan was then called for the plaintiff (defendant in error here), and amongst other things testified that on the 26th of January, 1889, he received a telegram from Superintendent Whited that a passenger on No. 4 had drawn a six-shooter on Conductor Derbyshire, and to have an officer on hand on the arrival of the train.

" When I received that word the train was in " sight. I could see the headlight of the locomo- " tive, about four or five miles distant. Upon re- " ceipt of that telegram I went to Constable Cozzens

" and showed him the telegram, told him what it " contained, and requested him to be there when " the train came in. I told him to arrest him. I " had not time before the train arrived to obtain a " warrant. There was no other station between " Lovelocks and the western line of Humboldt " county,—no stopping place for train No. 4."

See Testimony of Donellan, transcript, p. 49.

The plaintiff then called E. S. Luty, who narrated the circumstances of his interview with Hamilton upon the subject of the ticket in question, and the reasons for demanding his signature, and explaining the rules of the company, which induced the demand, and his whole action in the premises, not materially different from the testimony of Mr. Hamilton; and the plaintiff's case was thereupon submitted.

The defendant's testimony upon the question of plaintiff's arrest corroborated the evidence upon the part of the plaintiff's witnesses, showing that the arrest was made upon the ground only of the assault made upon the conductor by the plaintiff with a deadly weapon.

See Testimony of Derbyshire, transcript, p. 57.

See Testimony of Whited, transcript, p. 60.

The foregoing statement of the evidence is full and comprehensive, and with the exception of the last two references to the testimony of Derbyshire and Whited, which is cumulative merely, and not in conflict with the evidence upon the part of the plaintiff, the facts in this case upon which we rely fell from the lips of the plaintiff and his witnesses, undisputed by us in every material particular, and absolutely beyond controversy or cavil, in respect to the first issue which the Court submitted to the jury, to wit:

"The question as to the cause of plaintiff's arrest
" at Lovelocks is a mixed question of law and fact.
" If the jury believe from the evidence, from a
" consideration of all the attendant and surround-
" ing circumstances, as testified to by the various
" witnesses upon this trial, that the agents of the
" defendant caused the arrest of plaintiff to be
" made by a peace officer at Lovelocks simply as a
" means to the end of ejecting or removing plain-
" tiff from the car, on the ground that he had re-
" fused to sign his name, pay his fare or leave the
" car, then such officer should be treated as the
" special agent of the defendant for that purpose,
" and the defendant would be liable for his acts in
" the same manner, and to the same extent, as if
" the officer's acts had been committed by a regu-
" lar agent of the defendant. But if you believe
" from the evidence that the plaintiff was removed
" from defendant's train by an officer of the law in
" the official discharge of his duties, on a criminal

" charge made upon a reasonable cause of the com-
" mission of a felony by plaintiff, and the agents of
" the defendant who authorized plaintiff's arrest,
" and that the officer who made the arrest believed
" such charge, then I instruct you that such officer
" had the right to arrest plaintiff and detain him
" upon such charge, and the defendant cannot be
" held responsible for such arrest and detention in
" this action. An officer may, upon reasonable
" cause appearing therefor, arrest a person for the
" commission of a felony, although no felony was
" in fact committed."

The vice of this instruction is that it submits to the jury a question of fact, and invites an issue upon it, without any dispute having arisen or controversy raised thereon by the evidence.

The uncontradicted testimony is that Derbyshire telegraphed to his superintendent, Whited, that a man on the train had drawn a six-shooter on him, and he wanted him taken off at Lovelocks. Whited, who was at Wadsworth, eighty-five miles away, wired the agent at Lovelocks of the contents of Derbyshire's telegram, and to have an officer on hand when the train arrived. Doulon showed the telegram to the officer, and secured his presence at the train. When the train reached Lovelocks Derbyshire informed the officer that a man had drawn a six-shooter on him, that he was wild and desperate, and to look out

for him, and did not even dare to point him out. Neither Whited who gave the order for the officer's presence, Donlon who conveyed the order to the officer, nor Officer Cozzens who made the arrest, ever knew or heard of any controversy between Derbyshire and the plaintiff, growing out of the ticket in question.

See testimony of these witnesses heretofore referred to.

And this was all of the evidence submitted on this point. The evidence being undisputed, the Court should have declared to the jury, as a matter of law, that the officer in making the arrest acted upon the responsibility of his office, in his official capacity, and that the defendant was not liable in this action for the manner in which such arrest was accomplished. It is error for a court in its charge to the jury to assume a controversy of fact which is not made so by the testimony.

" When the evidence to a fact is positive and not
" disputed or questioned, it is to be taken as an estab-
" lished fact, and the charge of the Court should pro-
" ceed upon that basis. It is only when there may be
" doubt that the jury are required to weigh the evi-
" dence, and it is then only that the rule applies

" that the Court shall not charge upon the weight " of the evidence."

Hintz vs. *Morrison*, 17 Texas, 372.
People vs. *Welch*, 49 Cal., 181.

In the case last cited the Court says, in speaking of the provision of the Constitution which prohibits the Court from charging upon matters of fact:

" The provision of the Constitution is equally " applicable to civil and criminal proceedings, and " in both it may become the duty of the Judge to " determine whether there is any evidence to sus- " tain the main issue or to sustain any fact " on which a particular judgment must nec- " essarily depend. Of course such determina- " tion should be the result of prudent and " cautious examination, but in a proper case the " Court may act on the assumption that there is no " evidence in respect to a particular issue and grant " a nonsuit, or advise an acquittal, or frame its " charge to the jury without reference to the exis- " tence of facts as to which no evidence has been " produced. The matters of fact as to which the " Court is not permitted to charge the jury are the " facts contested, or in some degree sought to be " established by the evidence."

In the case of *Janin* vs. *London and S. F. Bank*, 92 Cal., p. 27, the Court says:

" In this case the burden of proof to show that it " sustained damage or injury by the negligence of

" plaintiff was upon the defendant, and this it was
" required to show by evidence having some reason-
" able tendency to establish such fact. In order to
" justify the submission of any question of fact to
" a jury, the proof must be sufficient to raise more
" than a mere conjecture or surmise that the fact
" is as alleged."

It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists; and, when the evidence is not sufficient to justify such an inference, the Court may properly refuse to submit the question to the jury.

When there is no serious controversy about the facts, and the law upon the undisputed evidence precluded any recovery against the company, a peremptory instruction to find a verdict for the defendant is proper, and it is the duty of the Court to give it.

Railroad Co. vs. *Fraloff*, 100 U. S., 26.
Schuchardt vs. *Allens*, 1 Wall., 369.
Parks vs. *Ross*, 11 How., 373.
Richardson vs. *City of Boston*, 19 How., 269.
Pleasants vs. *Faut*, 22 Wall., 121.
Toland vs. *Sprague*, 12 Pet., 336.

It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the Court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact without some evidence legally sufficient to establish it. It is therefore error in the Court to instruct the jury that they may find a material fact of which there is no evidence from which it may be legally inferred.

Parks vs. *Ross*, 11 How., 373.

"Legally inferrable facts does not mean forced "and violent inferences, but only such conclusions "as a jury or Court may fairly and justifiably draw "from the testimony."

Pleasants vs. *Faut*, 22 Wall., 121.

It was necessary for the plaintiff in the lower court to allege and prove that the acts complained of were committed by the agents of the company; that fact, vital to the pretentions of plaintiff, he signally failed to establish. There was absolutely no evidence, we contend, in the case, that tended to establish the agency of the ejectors, or from which it could be legally inferred that they were acting otherwise than as officers of the law, engaged in the discharge of an official duty; therefore the Court erred in submitting,

as a question, whether the arrest of plaintiff was caused to be made by a peace officer simply as a means to the end of ejecting or removing him from the car, on the ground that he had refused to sign his name, pay his fare or leave the car, and instructing them that, if they so believed, the officers should be treated as the special agents of the defendant, and the defendant would be responsible accordingly.

Neither the officer nor any agent of the company who had secured his presence there knew the plaintiff was without a ticket, or had reason to believe that he was otherwise than a violent and dangerous man, who had committed a felonious assault on the conductor with a deadly weapon.

"It is the duty of a court, in its relation to the "jury, to protect parties from unjust verdicts aris- "ing from ignorance of the rules of law and of evi- "dence, from impulse of passion or prejudice, "or from any other violation of his lawful "rights in the conduct of a trial. This is done "by making plain to them the issues they are to "try, by admitting only such evidence as is proper "in these issues, and rejecting all else; by instruct- "ing them in the rules of law by which that evi- "dence is to be examined and applied, and finally, "when necessary, by setting aside a verdict which "is unsupported by evidence or contrary to law."

"In the discharge of this duty it is the province "of the Court, either before or after the verdict, to "decide whether the plaintiff has given evidence "sufficient to support or justify a verdict in his "favor; not whether on all the evidence the pre-"ponderating weight is in his favor,—that is the "business of the jury,—but, conceding to all the "evidence offered the greatest probative force "which, according to the law of evidence, it is "fairly entitled to, is it sufficient to justify a "verdict? If it is not, then it is the duty of "the Court, after a verdict, to set it aside and "grant a new trial. Must the Court go through "the idle ceremony in such a case of sub-"mitting to the jury the testimony on which "plaintiff relies, when it is clear to the judicial "mind that, if the jury should find a verdict in his "favor, that verdict would be set aside and a new "trial had? Such a proposition is absurd, and "accordingly we hold the true principle to be that, "if the Court is satisfied that, conceding all the "inferences which the jury could justifiably draw "from the testimony, the evidence is insufficient to "warrant a verdict for the plaintiff, the Court "should say so to the jury."

Pleasants vs. *Faut*, 22 Wall., 121.

In the same case, the various cases announcing that it is the duty of the Court to instruct the jury to find for the defendant, if the evidence is not legally sufficient to warrant a recovery, are approved. If it is the duty of the Court to with-

draw the case from the jury where the evidence is insufficient to justify the action, it must be error to submit an issue for the consideration of the jury where there is no evidence, or the testimony is legally insufficient, to establish the plaintiff's contention thereon.

When the facts were agreed upon or ascertained it became a question of law whether plaintiff was ejected from defendant's train by an officer of the law acting in his official capacity or as the special agent of defendant, and in such case it was error to submit to the jury the question whether the officer was acting officially or as an agent.

Reed vs. *Swift*, 45 Cal., 256.

In this case the Court instructed the jury that the question as to the cause of plaintiff's arrest at Lovelocks is a mixed question of law and fact. Whether the officer was called upon to act in his official capacity to arrest the plaintiff, or was called simply as a means of removing him from the car, is simply a question of fact. The facts calling into play the acts of the officer were both clearly proved by uncontradicted testimony, and admitted by the plaintiff. Now, there being no conflict of testimony upon that point, the credibility of the witnesses standing unimpeached

and the facts being conceded, it became a question whether, under the established facts and circumstances, the plaintiff acted as an agent of the State or of the defendant, and that question was purely one of law which it was error to submit to the jury for determination.

The question under consideration in the case at bar is on all fours with the question of probable cause in an action for malicious prosecution. Whether the circumstances alleged to show it probable or not probable are true and existed is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law.

Patter vs. *Seale*, 8 Cal., 220.
Grant vs. *Moore*, 29 Cal., 44.
Emerson vs. *Skaggs*, 52 Cal., 247.
Stone vs. *Croker*, 24 Pick., 85.
Pangburn vs. *Bull*, 1 Wend., 352.
Cloon vs. *Gerry*, 13 Gray (Mass.), 202.
Wade vs. *Walden*, 23 Ill., 372.

For the purpose of ascertaining whether the instruction complained of is vulnerable to the attacks made we may turn to the decided cases for precept and principle applicable by analogy and the doctrine of *res adjudicata:*

What constitutes "delivery and change of possession" is a mixed question of law and fact. What are the circumstances existing in the particular case is a question of fact for the jury; but, conceding their existence, whether they constitute the immediate delivery, and the actual and continued possession required by the statute, is solely a question of law for the Court. Where the facts are conceded or clearly proved there is nothing for the jury to determine.

Vance vs. *Boynton*, 8 Cal., 561.
Bell vs. *McClellan*, 7 Cal., 285.
Hodgkins vs. *Hook*, 23 Cal., 581.

The term "reasonable time" is a technical and legal expression which in the abstract involves matter of law as well as matter of fact. Whenever any rule or principle of law applies to the special facts proved in evidence, and determines their legal quality, its application is matter of law.

Luckhart vs. *Ogden*, 30 Cal., 558.
Himmelmann vs. *Hotaling*, 40 Cal., 116.
Poorman vs. *Mills*, 39 Cal., 351.

What constitutes "actual possession" is a mixed question of law and fact. The facts being

found or admitted, their sufficiency to prove actual possession is a question of law.

Polock vs. *McGrath*, 32 Cal., 19, 20.

" Whether credit given under power of sale is reasonable under all the circumstances? " is a mixed question of law and fact to be determined after the testimony is heard.

Brown vs. *Central Land Co.*, 42 Cal., 261, 262.

What constitutes " negligence," when the facts are admitted or established by uncontroverted evidence, is a matter of law for the Court.

Flemming vs. *W. P. R. R. Co.*, 49 Cal., 257, and cases there cited.

Deville vs. *S. P. R. Co.*, 50 Cal., 285.

When the facts are clearly settled, and the course which common prudence dictates can be readily discerned, the Court should decide the case as a matter of law.

Fernandes vs. *Sac. City R. Co.*, 52 Cal., 50.

Glascock vs. *C. P. R. R. Co.*, 73 Cal., 141.

Whether a weapon is deadly may depend upon the manner of its use, which is a question of fact

for the jury, but that being the character of the weapon should be pronounced by the Court.

People vs. *Fuqua*, 58 Cal., 247.

All effort in judicial administration expends itself in two directions: 1. In ascertaining the ultimate or constitutive facts upon which the rights of the parties depend; 2. In applying the law to such facts.

In cases at law the jury ascertain the facts, and the Judge applies the conclusions of law to them.

The Judge, then, decides questions of law; the jury questions of fact. It is obviously the right of every suitor to have the opinion of the Judge upon questions of law material to the proper determination of his case. The jury are not qualified to determine such questions, and they are calculated to confuse, embarrass and mislead them. The general rule, therefore, is that it is error for the Judge to submit questions of law to the determination of the jury.

1 Thompson on Trials, sec. 1017, and authorities cited.

Hickey vs. *Ryan*, 15 Mo., 63, 67.
Fugate vs. *Carter*, Mo., 267, 273.
Kelly vs. *Cunningham*, 1 Cal., 367.

In the case of a mixed question of law and fact the jury are to find the facts, and the Court is to pronounce the law upon the facts as they may be so found.

Fourth National Bank vs. *Henschen*, 52 Mo., 207–09.

This is done in two ways, either by a special verdict, in which case the jury first find the facts, and aftewards the Judge, in rendering the judgment, pronounces the law upon them; or in the form of hypothetical instructions given by the Judge to the jury, he telling them that, if they find from the evidence a given state of facts, the law is for the plaintiff or the defendant as the case may be. The latter practice was adopted by the Court in this case. But we contend that it is in cases where the evidence is conflicting upon the point in issue, and only in such cases, that the Court should, in instructing the jury, declare the law upon the alternative hypothesis of fact presented by the opposing testimony.

Marshall vs. *Schricker*, 63 Mo., 308.

Therefore it is not to be understood that, in the submission to a jury of a mixed question of law and fact, the jury in any civil case is to de-

termine what the law is except as it receives it from the Court. In disposing of the issue the jury is bound to act upon the law as given to it by the Court, and to apply it to the facts as found under the guidance of the Court.

In short the jury, in all civil cases, is confined to the ascertainment of the facts relied upon, and affords or denies relief through the verdict according to law as the same is given to it by the Court.

If the facts upon which depended the question whether the plaintiff was arrested by the officer of the State or ejected by an agent of the defendant were conflicting or controverted, we understand the proper course would have been for the Judge to have charged the jury hypothetically, that is, to have stated what facts in the case would establish the official conduct of the officer, or, if they believed a given state of facts, certain legal principles would apply, and to leave it for the jury to say whether the evidence showed that state of facts.

But in this case there was no dispute as to what, when, where or why Mr. Cozzens and his assistants did: that is, that Mr. Cozzens was a constable and deputy sheriff; that the train was in sight of Lovelocks when the company's agent there showed him a telegram from the division

superintendent reading: "Agent, Lovelocks: "Conductor Derbyshire on No. 4 wires me that "a man on his train has drawn six-shooter on "him. Have an officer on hand when No. 4 "arrives. J. H. Whited;" that upon the arrival of the train he was told the plaintiff was armed and desperate; that he procured the assistance of a saloon-keeper, and as an officer arrested the plaintiff, who recognized and submitted to him as such; that the plaintiff was held, examined and discharged by a justice of the peace under a regular charge and complaint for a felonious assault; that neither the division superintendent, the agent at Lovelocks, nor the officer, knew anything of any controversy about a ticket. Candid men cannot read the record without being forced to the conclusion that the conductor telegraphed to his superintendent, not because the plaintiff wouldn't pay his fare, sign his ticket or leave the train, but because and only because he had drawn a pistol and jeopardized, not only his life, but the safety of the train with its load of living freight. The lives of passengers would hang by slender threads indeed if imagined, fancied or even real grievances will justify a reckless resort to a deadly weapon, and consequent impairment or destruc-

tion of the mental or physical activity of the conductor.

The statutes of the State of Nevada provide that an arrest may be made by a peace officer without a warrant "On a charge made upon rea- "sonable cause of the commission of a felony by "the party arrested;" and though no felony was in fact committed, as to what constitutes "reason- "able cause" very largely depends upon the facts and circumstances of the case in which the question arises; and the construction of the term should always be sufficiently broad and liberal to amply protect officers in the performance of official acts. The Court in this case instructed the jury that "There should be a reasonable "ground of suspicion supported by circumstances "sufficient to warrant the officer in believing that "the party is guilty of the offense charged "against him." The telegram of the superintendent, the conversation with the conductor, all of the facts and circumstances presented to the officer, convinced him that he had a desperate man to deal with who had committed a felonious assault upon the conductor. It is impossible for any candid man to reach any other conclusion from the evidence than that the plaintiff was arrested because the officer believed and was warranted in the belief that a dangerous man had

committed a serious offense, that it was the pistol and not the ticket that caused the arrest; and, if so, it follows to a demonstration that the arrest was made by an agent of the law and not of the defendant.

There was no conflict in the testimony. The facts established, it was for the Court to declare the law.

Applying the doctrine announced in the foregoing cases to the evidence in the case at bar, and it at once becomes apparent that the Court submitted to the jury, as a disputed question of fact, a proposition about which there was no controversy until the instructions were submitted, and thereby permitted the jury to assume the existence of facts contrary to the sworn testimony of every witness for both the plaintiff and the defendant whose evidence was directed to the subject-matter of the arrest.

That the defendant was prejudiced by this instruction is plainly evident, because the Court had by another instruction taken from the consideration of the jury any acts upon the part of the agents of defendant in their attempt to remove plaintiff from the train prior to reaching Lovelocks.

See Instructions, transcript, p. 74.

It was the submission, then, to the jury of the question whether the officer, in making the arrest, acted in his official capacity, or as the agent of the defendant, which left anything for the jury to determine in the action; and, as we have shown, this question was purely imaginary, uncontroverted by the testimony, unmooted between counsel, and had its existence only in the charge of the Court.

As this is a matter of vital importance in the determination of the issues presented to this Court, and in order that its solution may be rendered with as little labor as possible upon the part of this tribunal, we beg once more to restate the testimony, grouping the witnesses for the plaintiff and defendant, and then submit whether, upon any rational view of the evidence, there was any warrant for this instruction to the jury.

Plaintiff's Witnesses.

OFFICER COZZENS:

"Q. Mr. Cozzens, from whom did you first re-
"ceive information concerning the arrest of Ham-
"ilton?

"A. Mr. Donlon, the agent.

"Q. What information did he give you?

"A. He told me there was a man on No. 4 that
"pulled a six-shooter on the conductor at Rye

" Patch, and they wanted me to take him off the " train.

" Q. Did you see the telegram that the agent had " received,—Donlon?

" A. Yes, sir. The telegram read as follows: " ' Agent, Lovelocks: Conductor Derbyshire on No. " ' 4 wires me that a man on his train has drawn a " ' six-shooter on him. Have an officer on hand " ' when No. 4 arrives.

" ' J. H. WHITED.' "

It was admitted that Whited was Division Superintendent.

" Q. Do you know why Mr. Donlon came to you " to take him off?

" A. Well, I suppose he came to me because I was " an officer.

" Q. Did you know anything about the fact that " Mr. Hamilton—I mean at this particular time— " had had trouble in regard to a ticket?

" A. No, sir; I did not know anything about the " ticket.

" Q. Did you know anything about any ticket " trouble between himself and the conductor?

" A. No, sir.

" Q. Then state now to the jury why you took " Mr. Hamilton off the train.

" A. Well, I took him off because he had drawn " a weapon, or pistol, or six-shooter on the con- " ductor, as I was told.

" Q. Did you have any conversation with Mr. " Derbyshire concerning Mr. Hamilton when the " train came in?

" A. Yes, sir.

" Q. What conversation did you have with him?

" A. Well, he came in and asked for Constable " Cozzens, and I told him I was the man he was " looking for.

" Q. Was the plaintiff present?

" A. No, sir; this was in the office of the tele- " graph office, and I told him I was going in there " to take that man off. Mr. Derbyshire came in " and asked for Constable Cozzens, and I says: 'I " 'am the man; here I am. I guess you want me " 'to take that man off.' And he says, 'Yes.' " Says I, 'What kind of a man is he?' 'Well,' " he said, 'he is wild.' He said, 'He has got a " 'six-shooter,' well, I think he said about that long " [about one foot]; and he says, 'His eyes are " sticking out like that,' and I was a little fright- " ened, and went off and heeled myself. I wanted " Derbyshire to show me the man, and he would " not do it because he was afraid.

" Q. Why did you put the handcuffs on him?

" A. Because I was afraid he would pull a pistol " on me and make me run.

" Q. Did you do that as an officer?

" A. Yes, sir.

" Q. Did the fact of your taking him off the train " have anything to do with the ticket at all?

" A. No, sir.

" Q. When you were requested to take Mr. Ham- " ilton off that train, was there anything said to " you by anybody that the company requested you " to take him off because he had refused to sign a " ticket or would not pay his fare?

" A. No, sir.

" Q. That was not the reason at all?

" A. Nothing said about a ticket.

"Q.—*By Mr. McMillan.* Now, Mr. Cozzens, you "say that you armed yourself, went and got an "armed assistant and put irons on this man, be- "cause you thought he was a dangerous character?

"A. Yes, sir.

"Q. From what source did you get the infor- "mation?

"A. Well, Mr. Donlon told me first that he had "pulled a pistol on the conductor, and then Mr. "Derbyshire telling me that he had a pistol about "that long [showing].

"Q. Then, in other words, you got all of this in- "formation from the defendant or its agents?

"A. Yes, sir."

MR. DONLON, called for the plaintiff, testified as follows:

"On January 26th, 1889, I received a telegram "from Superintendent Whited that a passenger on "No. 4 had drawn a six-shooter on Conductor Der- "byshire, and to have an officer on hand on the "arrival of the train No. 4. When I received that "word the train was about four or five miles distant. "It was in sight. I could see the headlight of the "locomotive. Upon receipt of that telegram I went "to Constable Cozzens and showed him the tele- "gram, and told him what it contained, and re- "quested him to be there when the train came in. "I believe that is all I did. I requested him to "arrest him. I supposed it was necessary to arrest "him. I had no time before the train arrived to "obtain a warrant. The train usually remained at "that station two or three minutes generally.

" There is no other station between Lovelocks and " the west line of Humboldt county,—no stopping " place for No. 4."

Defendant's Witnesses.

Upon the part of the defendant, GEORGE DERBYSHIRE testified, after stating various conversations with the plaintiff relative to the ticket, as follows:

" I then informed him that I would have to put " him off the train,—eject him from the train. I " did attempt to eject him from the train at Rye " Patch, but was unsuccessful. The whole transac- " tion occurred in this way: I asked him if he would " get off the train peaceably, of his own accord, " and he said he would not. He said: 'You will " 'have to carry me off.' I said all right, I would " try and carry him off, and as I took hold of him " he took hold of an arm-rest under the window-sill, " and put his toes under the heater pipe, and I " could not budge him. I asked a brakeman to " assist me, and the two of us could not stir him. " I finally released my hold and told the brakeman " to go after the baggageman. I stepped out of the " car onto the platform, out of his sight, on the " west end of the car, and when I returned he had " just taken his pistol out of his grip, and was get- " ting up on the back of his seat about the middle " of the car, about eighteen feet from where I was, " and as he got up he threw his hand over the " handrailing and pulled his gun down on me,—

" his pistol,—and I went. The baggageman, how-
" ever, did not come into the car, and I did not go
" in either after that.

" * * * I then sent a message to Mr.
" Whited at Wadsworth, the Division Superinten-
" dent, that a man on the train had pulled a pistol
" on me,—a six-shooter, I think I worded it,—and
" asked him to have him taken off at Lovelocks. I
" could not remember now exactly how it was
" worded. I wanted him taken off for pulling the
" gun on me, and I did not dare to go into the car
" again while he was in it.

" When I came to Lovelocks I had a conversation
" with Constable Cozzens. I don't know whether
" he spoke first or I did. Anyway he wanted to
" know where the man was that pulled the gun, and
" I told him, and there was a gentleman standing
" on the platform by the name of Patterson. I
" stepped up to him and said: ' Mr. Patterson will
" ' point him out to you.' I did not have much
" love for pointing him out, but I did tell Mr. Coz-
" zens what he did. I stated to Cozzens, as near as
" I can now recollect, that he he had pulled a gun
" on me, and I would like to have him taken off
" the train. That was all that transpired,—all the
" conversation. I did not say anything to the
" officer in regard to any trouble I had with him
" about a ticket."

Upon cross-examination he testified:

" Q. You are sure, Mr. Derbyshire, that he point-
" ed the pistol at you ?

" A. Yes, sir.

" Q. You could not be mistaken ?

" A. No, sir."

J. H. WHITED, called for the defendant, being sworn, testified as follows:

"The position I occupied with reference to the "defendant in the month of January, 1889, was "Division Superintendent for them.

"I received a communication from Conductor "Derbyshire upon or about the 26th day of Jan- "uary of that year, with reference to a transaction "occurring on the train. The first information I "received was from Rye Patch, that a passenger or "party on the train had drawn a six-shooter and "stood him off, and asked if he could not be "arrested at Lovelocks. I then sent a message to "the station agent at Lovelocks, what Conductor "Derbyshire had told me by wire, and asked him "to have an officer there when the train arrived. "Did not have any information, at the time I gave "that order to our agent at Lovelocks, that there "was any dispute between the passenger and con- "ductor over a ticket, and my order to the agent "at Lovelocks was based upon the information "that a man had stood off a conductor with a six- "shooter."

Upon cross-examination he stated that he was Conductor Derbyshire's superior officer, and it was his duty to report to him.

"I sent the word to the agent at Lovelocks by a "telegram. I saw the dispatch yesterday signed "'J. H. W.;' that is the ordinary way I sign my "name. I did sign my name to that dispatch in "that way, and the contents of that dispatch is what "I sent"

In addition to the foregoing testimony, the plaintiff introduced in evidence the complaint filed by Doulon, and the warrant issued thereon, showing that the arrest was immediately followed by a written complaint and warrant charging the assault for which the officer made the arrest.

Upon this evidence, we reiterate that the arrest of the plaintiff was procured solely for the criminal assault which he had made upon the conductor, by an officer of the law in the official discharge of his duty, and the question of his being an agent of the defendant in making the same was an unwarranted perversion of the facts.

That a peace officer may, without warrant, arrest and detain a person charged with the commission of a felony was correctly charged by the Court, and will doubtless be conceded upon this argument.

General Statutes of Nevada, sec. 4017.
Rohan vs. *Sawin*, 5 Cush., 281.
Holly vs. *Mix*, 3d Wendell, 351.
Samuel vs. *Payne*, 1 Doug., 358.
Becksmith vs. *Philby*, 6 Barn. & Cress, 35.

The reason of the rule is well stated by Mr. Justice Dewey in the case of *Rohan* vs. *Sawin*, 5 Cush., as follows:

"The public safety and the due apprehension of "criminals charged with heinous offenses imperi- "ously requires that such arrests should be made "without warrant by officers of the law. As to the "right appertaining to private individuals to arrest "without a warrant, it is a much more restricted au- "thority, and is confined to cases of the actual guilt "of the party arrested, and the arrest could only be "justified by proving such guilt. But as to con- "stables and other peace officers, acting officially, "the law clothes them with greator authority, and "they are held to be justified if they act in making "the arrest upon probable and reasonable grounds "for believing the party guilty of a felony; and "this is all that is necessary for them to show in "order to sustain a justification of an arrest, for "the purpose of detaining the party to await further "proceedings under a complaint on oath, and a "warrant thereon."

In this case the warrant was issued within a half hour subsequent to the arrest, which was the earliest moment possible under the circumstances. When the information was received by the agents of the company, at Lovelocks, of the assault made by the plaintiff upon the conductor of the defendant, the train was in sight of the depot, and no opportunity was afforded to secure

a warrant before the defendant would have been carried beyond the jurisdiction of the court.

See Testimony of Donlon, a witness for plaintiff, transcript, pp. 49, 50.

The crime for which the plaintiff was arrested, and subsequently charged by the complaint (and, by the way, of which he was clearly guilty), was an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury, which is a felony under the statutes of the State of Nevada.

See General Statutes of Nevada, sec. 4610.

Again, this instruction is faulty and misleading for another reason:

"If," says the Court, "you believe from the evi-
"dence, etc., that the agents of the defendant
"caused the arrest of the plaintiff to be made by a
"peace officer at Lovelocks simply as a means to
"the end of ejecting or removing him from the car,
"on the ground that he had refused to sign his
"name, pay his fare or leave the car, then such
"officer should be treated as a special agent of the
"defendant for that purpose, and the defendant
"would be liable for his acts in the same manner
"and to the same extent as if the acts of the officer
"had been committed by a regular agent of the de-
"fendant."

It will be borne in mind that there was, and is, no controversy or question that Cozzens was in fact a peace officer, and that he and his assistant whom he appointed for that purpose made the arrest of the plaintiff as such peace officers. This at least cannot be questioned. Now, in making such arrest as peace officers, under certain circumstances the defendant might be liable, but not in this form of action. If the defendant's agents, acting within the scope of their authority, either with or without malice, and without probable cause, secured the arrest of the plaintiff by a peace officer or any one else, the defendant in a proper action would have to respond in damages; but in order to maintain such an action a proper pleading should be presented for that purpose, charging either malicious arrest, or false imprisonment, where both malice and a want of probable cause would constitute the gravamen of the complaint.

W. S. Barker vs. *William Stetson et al.*, 7 Gray, 53.
Mullen vs. *Brown*, 138 Mass., 114.
Gilzenlutcher vs. *Niemeyer*, 64 Wis., 316.
Duzy vs. *Helm*, 59 Cal., 188.
Mark vs. *Townsend*, 97 N. Y., 590, 6 & 7.
Plummer vs. *Denitt*, 20 Am. Dec., 316.

Norman vs. *Maciette*, 1st Sawyer, 484.
Langford vs. *The Boston R. R. Co.*, 144 Mass., 431.
Miller vs. *Adams*, 7 Lansing, 131.
Fisher vs. *Langbin*, 103 N. Y., 84–93.
Gardiner vs. *Baine*, 5 Lansing, 256.
Wagstaff vs. *Scheppel*, 27 Kan., 450.
Herzy vs. *Graham*, 9 Lea (Tenn.), 152.
Duhl vs. *Forester*, 37 Ohio State, 473–75.

It is shown by the plaintiff, and undisputed in evidence, that within from one-half to one hour after his arrest by the officers he was taken before a magistrate, whose jurisdiction in the premises is unquestioned, and a regular complaint was filed against him upon which a warrant was issued, both of which were put in evidence by the plaintiff, and upon which he was held until discharged by the Court. These documents were regular upon their face, and the warrant was a complete justification for the officer in detaining the plaintiff under the charge. This, in the light of the foregoing authorities, would defeat an action for false imprisonment, and would confine the plaintiff to his remedy against the defendant for malicious arrest and prosecution, to maintain which he must show both malice and a want of probable cause, and

these facts should be set out by appropriate averments in the complaint. When the facts are undisputed, probable cause is a question of law for the Court.

In the case of *Patten* vs. *Seale*, 8th Cal., 220, the Court says:

"Public policy and public security alike require "that prosecutors should be protected by the law "from civil liabilities except in those cases where "the two elements of malice in the prosecutor and "want of probable cause for the prosecution both "concur. Though malice may be proved, yet if "there was probable cause the action must fail. "Malice may be inferred from a want of probable "cause; but a want of probable cause cannot be "inferred from malice, but must be affirmatively "shown by the plaintiff. As to the question of "malice it is one solely for the jury, and to sustain "this averment the charge must be shown to have "been willfully false. Probable cause is a mixed "question of law and fact. Whether the alleged "circumstances existed or not is simply a question "of fact, and conceding their existence, whether or "not they constitute probable cause is a question "of law. Where the circumstances are admitted "or clearly proved by uncontradicted testimony, it "is the province of the Court to determine the "question of probable cause. As the question of "probable cause is a mixed question of law and fact "it is error to submit to the jury to say whether "there was probable cause."

See, also,

Grant vs. *More*, 29 Cal., 44.
Emerson vs. *Skaggs*, 52 Cal., 247.
Stone vs. *Crocker*, 24 Pick., 85.
Pangburn vs. *Bull*, 1 Wend., 352.
Cloon vs. *Gerry*, 13 Gray (Mass.), 202.
Wade vs. *Walden*, 23 Ills., 372.

The evidence in this case of the plaintiff's conduct leading up to his arrest was testified to by him, and undisputed by any witness; it was therefore admitted. Was it not then plainly the duty of the Court to say to the jury that the plaintiff, having admitted that he had drawn his pistol, climbed upon the back of the seat with revolver in hand, determined to maintain his position in the car where he had no right to remain, either constituted probable cause for his arrest or the contrary, instead of declaring it to be a mixed question of law and fact?

The plaintiff by his own evidence confessed to the commission of a crime; the defendant's agents by their testimony showed that they arrested him for it; and this, according to the charge of the Court, constituted a mixed question of law and fact, which we think is clearly erroneous.

II.

But even if it were otherwise, and that the jury were permitted to assume, in the absence of testimony, that the officer in making the arrest did not act in his official capacity, but simply as an agent of the defendant, we still insist, under the law as laid down by the Court, the defendant was wholly justified in expelling the plaintiff from the train, and to use the means employed and the manner pursued to accomplish that purpose.

The Court instructed the jury upon this branch of the case as follows:

"It necessarily follows from what I have said that "the ticket which was presented by Hamilton at "Ogden was not such a ticket as the defendant, the "Southern Pacific Company, was bound to honor. "And if you believe that the agents of the com- "pany at the times he went upon the train notified "him that the ticket in that form was not such as "they were entitled to honor, and that unless he "signed his name he would not be allowed to travel "upon it, or, in other words, that he would have "trouble with the conductors, the conductor had "the right to request him, on the presentation of "that ticket, to sign his name. That was the only "objection made to it. If he had signed his name, "the testimony is that he would have been allowed "to travel upon that ticket as a first-class unlimited "ticket. If he refused to sign his name, pay his

" fare or leave the train, then the conductors or " agents of the defendant had the right to use as " much force as was necessary, and no more, in " order to remove him from the train.

" You are instructed that a party cannot increase " his compensation or his measure of damages by " reason of his refusal to leave a train, upon being " informed by the conductor that he cannot accept " the ticket presented as evidence of his right to be " carried. The conductor, for the time being, is " the judge of the passenger's right, and the rail- " way company is responsible to the passenger for " any mistake which the company makes affecting " the rights of the passenger in the premises, but is " entitled, owing to his position, and the responsi- " bilities dependent upon the safe and orderly con- " duct of a passenger train, to interpret and enforce " the rules of the company in accordance with his " judgment; and the passenger, being informed of " the demands of the conductor, must submit " thereto, and either pay his fare or leave the train, " and if the conductor is in the wrong seek redress " by an action against the company for damages.

" And in this case, if you find from the evidence " that the conductors of the defendant informed " plaintiff that they would not receive or honor the " ticket presented by the plaintiff, and that he " should either sign the ticket, pay his fare or leave " the train, and that he declined to comply with " either of said requests, he cannot increase his " compensation by attempting to defend his posi- " tion upon the train by the use of a weapon, or by " inviting the resort to superior force to remove him " therefrom. A passenger should not be permitted " to invite a wrong and then complain of it."

Applying these principles of law to the facts in the case, which are undisputed and established by all of the testimony before the jury, it must be admitted that the jury absolutely disregarded the instructions of the Court, and in a spirit of perverseness, unparalleled in the history of jurisprudence on this continent, found a verdict for the plaintiff for the sum of $44,750.00.

See Verdict, transcript, p. 77.

"The ticket," says the Court, "presented by "Hamilton was not such a ticket as the defendant "Southern Pacific Company was bound to honor. "If you believe the agents of the company notified "him of that fact, and that he refused to sign his "name, pay his fare or leave the train, the conduc- "tors or agents of the defendant had the right to "use as much force as was necessary, and no more, "to remove him from the train."

Could the jury believe anything else from the testimony? Was there any other evidence in the case? Did not Hamilton, the plaintiff, a witness in his own behalf, swear to it, and was he not corroborated by the witnesses Luty, Case and Derbyshire, all testifying to the same state of facts? Then it must be conceded that he did present the ticket referred to in the charge to the agents of the defendant, and was notified by

them that without his signature they could not honor it, and that he should either sign his ticket, pay his fare or leave the train.

If this is not the evidence, or if the jury were justified in forming any other conclusion therefrom, then we submit, that what ought to be considered the facts in the case is not the undisputed sworn testimony of the witnesses, but rather the ignorance, caprice, passion or prejudice of the jury, regardless of the evidence, and which relegates suitors in the judicial forum to the condition of mere actors in a game of chance, without any chart by which they are to be guided, or any escape from injustice and wrong.

But we affirm that such is not the law, and that courts are established for the protection of human rights, and are governed by fixed rules and principles, which ought not to be frittered away by either ignorance, contumacy or caprice; and applying the rules by which courts are governed in the light of the authorities before cited, and to which reference is made, it is plainly apparent that these facts were undisputed and established :

First—That the plaintiff was informed by the agents of the defendant that the ticket which he presented was not such a ticket as they were

authorized to receive as evidence of his right to be carried; and

Second—That he should either sign his ticket, pay his fare or leave the train; and

Third—That, upon his refusal to comply with either of said requests, they would be compelled to remove him by force;

Fourth—That he declined either and all of these alternatives, and that the attempt made by the agents of the defendant to remove him without excessive violence was successfully resisted by him; and by resort to the use of a deadly weapon he drove the agents of the defendant from the car, where they dare not again enter except at the peril of their lives.

Upon this state of the case, and about which there was not nor can there be any controversy, the jury were told:

"A party cannot increase his compensation or "his measure of damages by reason of his refusal "to leave a train upon being informed by the con- "ductor that he cannot accept the ticket presented "as evidence of his right to be carried. * * * "And if you believe from the evidence that the "conductors of the defendant informed the plaintiff "that they would not receive or honor the ticket "presented, and that he should either sign his "ticket, pay his fare or leave the train, and that he

" declined to comply with either of said requests, he " cannot increase his compensation by attempting " to defend his position upon the train by the use " of a weapon, or by inviting the resort to superior " force to remove him therefrom. A passenger " should not be permitted to invite a wrong and " then complain of it."

How, then, we respectfully inquire, stands the case of the plaintiff when these principles of law are applied to the facts? This interrogatory does not suggest an inquiry as to the weight of evidence, which was the peculiar and exclusive province of the jury to determine, but is intended to operate as an open and unqualified declaration, that upon no hypothesis predicated upon the testimony was the plaintiff entitled to a verdict, if these instructions correctly lay down the law and were binding upon the jury.

And we shall show hereafter that the instructions of the Court must be accepted by the jury as the law of the case, and are binding upon them whether right or wrong. If, then, the plaintiff was not entitled to be carried, and the defendant was justified in using all necessary force to expel him from the train, and if he could not increase his compensation or the measure of his damages by resistance, and would not be permitted to invite a wrong and then complain of it,

all of which the jury were informed by these instructions, where is the evidence to support a verdict for $44,750, or any other sum of money whatsoever?

He had suffered no damage, either direct or consequential, when he was informed by the conductors that they could not honor his ticket, and requested him to either sign his ticket, pay his fare or leave the train. He had suffered no damage when the conductor and brakeman attempted to expel him from the train at Rye Patch, and were unsuccessful, and which culminated in the officers of the train being driven from the car by the plaintiff with a six-shooter. He did, according to his own testimony and that of every other witness, defend his position upon the train by the use of a deadly weapon, which the Court said he could not do, and then derive a benefit from it; he did, according to his own testimony, and that of every other witness, invite a wrong and then complain of it; but the jury, by their verdict, repudiated both of these instructions, and the Court, by permitting $15,000 of that verdict to stand, submitted to this innovation upon its prerogative, and allowed the jury to be the judge of both the law and the facts.

If it should be contended that, while the agents of the defendant were justified in expelling the

plaintiff from the train, they were still under the restriction not to use unnecessary force to accomplish that result, and that the jury were permitted to determine the extent of the force which was necessary in the premises, and admitting too, for the sake of this argument, that the officer who arrested the plaintiff was the agent of the defendant, still we insist that there is no evidence to support a verdict in the plaintiff's favor.

As was stated by the Court in *Pawling* vs. *The United States*, 4th Cranch, 219, speaking by Mr. Chief Justice Marshall, above cited:

"The general doctrine on a demurrer to evidence "has been correctly stated at the bar. The party "demurring admits the truth of the testimony to "which he demurs, and also those conclusions of "fact which a jury may *fairly* draw from that testi-"mony. *Forced* and *violent* inferences he does not "admit, but the testimony is to be taken most "strongly against him, and such conclusions as "the jury might *justifiably* draw the Court ought "to draw."

Tested by this rule, which is sustained by the great weight of adjudicated cases, and we submit that there was nothing before the jury to entitle the plaintiff to recover upon the score of excessive violence, taking into account every fact and reasonable inference therefrom which a jury might *fairly* draw from the evidence.

The defendant not only declined to leave the train peaceably, but successfully resisted the efforts of the defendant's servants to remove him without violence; he armed himself with a six-shooter and assumed an attitude of belligerency, with the threat, to use his own words, of "Hurting " any one who should attempt to molest him;" he subquently arranged his pistol in the waistband of his trousers, where it might be readily accessible for immediate use; he succeeded in driving the conductor and other servants of the defendant from the car, putting them in such a state of consternation and fear as to render him absolute master of the situation, with the conductor so far terrorized that he dare not again re-enter the car, and afraid even to point out the plaintiff to the officers who were called on to arrest him.

In this state of the case, which is uncontroverted in evidence, was the action of the officers, in placing the plaintiff in a state of non-combativeness by the use of handcuffs, anything but common, ordinary prudence, dictated by every consideration of personal safety to themselves and that of the passengers who were with the plaintiff on the train?

It is conceded that, if this question could be answered in the affirmative from any justifiable

consideration of the testimony, then the jury under the law were at liberty to adopt that view; but we insist that such a response finds no warrant in the testimony, and could only be the result of "forced and violent inferences," which are condemned by the Court in the case of *Pawling* vs. *The United States*, *supra*, and the whole current of authorities cited in that portion of our brief, where the cases are collated upon this point.

When it is calmly and dispassionately considered that the plaintiff in this case, without any ticket in his possession which the agents of the defendant could accept for passage, having been importuned for more than three hundred miles by the conductors to sign his ticket, pay his fare or leave the train, and not only resisting all reasonable importunities, but, also, the attempted resort upon the part of the agents of the company to physical force in order to remove him, and then assuming the role of a fighter and a bully, arming himself with a six-shooter in a crowded passenger-car, and branding a weapon, put the conductor and his assistants to flight; and the whole evidence upon that point in this case is stated, and that, too, from the very lips of the plaintiff.

This was the only evidence before the jury and the Court from which it was possible to conclude that excessive force was used in removing plaintiff from the train, and it was from this evidence that the jury had to manufacture excessive force in rendering a verdict for $44,750.00, and which the Court subsequently scaled down to the snug fortune of $15,000. The Court in awarding this judgment must have overlooked that portion of its charge wherein it had informed the jury that the plaintiff could not increase his damages by attempting to defend his position on the train by the use of a weapon, and that he could not invite a wrong and then complain of it.

We admit that the amount of force necessary to expel a person from a train is generally a question of fact to be determined by the jury, but their arbitrary determination, not only against the weight of evidence, but contrary to the whole testimony, and that, too, in such a manner as to outrage the proprieties of common decency and put a premium on acts of lawlessness and bravado, ought not to be permitted to block the highways of justice and constitute an insuperable barrier to merited relief.

In this connection the decision in the case of the *Atchison and Topeka R. R.* vs. *Gants*, 38 Kansas, 608, reported also in 5th American State

Reports, 780, is quite in point. In that case the plaintiff attempted to maintain his position upon the train by a resort to force, and in the altercation which ensued the plaintiff was injured and brought an action against the company for the injuries received. The Court in its decision uses this language:

"If Gants was a trespasser upon the train the "conductor had the right to eject him, and we "think the railroad company can only be made "responsible for the injuries inflicted which were "wanton, willful or malicious. In refusing to give "the instruction prayed for, and in giving to the "jury the twelfth instruction, and also the twen-"tieth, the Court made the railroad company liable "in damages for all excessive force used in over-"coming the resistance of Gants, without any in-"tention upon the part of the conductor or those "assisting him to commit injury. The first clause "of the twentieth instruction permitted Gants to "recover for the personal injuries inflicted upon "him and the suffering undergone by him in "consequence of his injuries, although a part of "the injuries may have been occasioned in over-"coming his own unlawful resistance. In *Galbraith* "vs. *Flemming*, 60th Mich., 403, the Court said: "'The law does not put a premium on fighting, "'and one who voluntarily enters into a quarrel "'will not be afforded relief for his own wrong in "'damages, even if he come out second best. While "'the voluntary act upon the part of the plaintiff "'would not preclude the State from punishing him

" 'or the defendant for a breach of the peace, it " 'nevertheless prevents him from bringing a civil " 'action to recover compensation for injuries re- " 'ceived by his own seeking, and in violation of " 'law.' In this case Gants could have remained " upon the train and gone to Florence by paying " his fare from Peabody to that station; or, when " the train stopped, he could have left the train " when requested to do so by the conductor in a " gentlemanly manner, and it is clearly evident " that, if he had done either, he would not have " suffered any personal injuries at the hands of the " conductor or trainmen. He stubbornly refused to " pay the additional fare, and also forcibly resisted " when requested to leave the train. He did all " this after the conductor informed him that the " train would not stop at Peabody, and that he must " pay to Florence or get off. Under the rule estab- " lished in this State in *Taylor* vs. *Clendening*, 4 " Kansas, 524, so long ago as 1868, Gants ought not " to recover even if his resistance might have been " overcome with something of less force than the " conductor and his assistants actually used, unless " such excessive force was willful, wanton or mali- " cious. By resisting to the utmost of his power and " ability Gants invited force, and he ought not to " complain of the force used if there was no inten- " tion upon the part of the conductor or his assis- " tants to commit unnecessary injury."

The decision as a whole is very instructive upon the propositions considered here, and in forcible and convincing logic shows that the pretensions of a suitor in precipitating a difficulty

which resulted in his own defeat should not be heard through the medium of the courts because the venture turned out somewhat unsatisfactory. In this case, however, no resort to violence was attempted. The method employed by the plaintiff could only have been resisted by a passage at arms, wherein not only the lives of those immediately engaged in it might have been forfeited, but those of innocent passengers on the train would doubtless have been sacrificed, if the course initiated by Hamilton had been carried to its legitimate conclusion. Instead of pursuing that course, and thereby endangering either the life of the plaintiff or any one else, the agent of the company realized that a resort to lawlessness and a breach of the peace was not only in open violation of his duty to his employer, but also in contravention of the written law regulating his duties as a citizen; and to this law the conductor applied as a law-abiding citizen, to shield himself and the passengers on the train from the perils of the plaintiff's revolver.

In the case of *Hall* vs. *Memphis and Charleston R. R. Co.*, 15 Federal Reporter, page 2, the Court says:

"I fully realize the feelings of a free American
"citizen in the face of threatened wrong and in-
"sult, but the safety of the ship forbids that he

" should fight with the master, and imperil the ship
" and the lives and property she carries. Better
" that he should suffer the wrong than to endanger
" or discomfort his fellow-passengers. The conduc-
" tor of a railway train is not altogether supreme,
" perhaps, as the master of a ship, but upon anal-
" ogous principles that seem to me obvious it is, I
" think, the duty of a passenger to avoid resistance
" beyond mere dissent, and submit to his authority
" without more than mere protest, unless resistance
" is necessary to defend himself against impending
" personal injury. In this case, therefore, it not
" appearing that the conductor was guilty of any
" attempted violence in overcoming the resistance
" of the plaintiff, and that he was as considerate of
" his age and obstinacy as possible, taking all the
" plaintiff said to be true, I do not feel author-
" ized on the proof to submit to the jury whether or
" not the plaintiff's resistance might not have been
" overcome with something less of force than the
" conductor used. The plaintiff said he did the
" best he could to retain his seat in the train by
" holding on and refusing to leave it.

" The same consideration, growing out of the mis-
" taken notion of the plaintiff that he was only vin-
" dicating his rights, and that to do this he must
" invite force, and his obstinacy in refusing to pay
" the additional fare demanded while he had abun-
" dance of money with him to do so, convinced me
" that he was intent on making a case against the
" railroad company by compelling the conductor to
" eject him, or recognize his tickets, and induced
" me to withdraw all the circumstances connected
" with his ejection from the consideration of the
" jury in aggravation of damages.

"In my judgment, passengers cannot be allowed "to build up cases for damages."

See, also,

Bass vs. *The C. & N. W. R. R.*, 36 Wis., 462.

Pennsylvania R. R. vs. *Connell*, 112 Ill., 303–305.

Bradshaw vs. *South Boston R. R.*, 135 Mass., 407.

C. B. & Q. R. R. vs. *Griffin*, 68 Ill., 504–506.

In the case last cited the Court says:

"The conductor must necessarily have the super- "vision and control of the train, otherwise there "would be no protection to the lives and comfort "of the public travel. If he abuses his trust, or "for any gross misconduct on the part of himself "or other employees toward passengers, the com- "pany will be responsible. The law requires the "highest degree of care on the part of all railroad "employees on passenger trains, for the comfort "and safety of the passengers. It is incumbent on "them to be civil and decorous in their conduct "toward them. But like responsibilities rest upon "the passengers. They must observe proper de- "corum, and be submissive to all reasonable rules "established by the company. The law will not "permit a passenger to interpose resistance to "every trivial imposition which he may really feel "or imagine himself exposed by the employees,

" that must be overcome by counter force in order
" to preserve subordination. It is due to good
" order and the comfort of the other passengers
" that he should submit for the time being, and
" redress his grievances, whatever they may be,
" by a civil action. A party will be entitled to
" quite as much damages for any wrong or injury
" quietly endured, as if violently resisted; indeed,
" the policy of the law ought to be to award him a
" higher measure of damages, and whatever per-
" sonal injuries may result from his violence should
" be attributed to his own want of subordination,
" for which the law will afford him no redress. He
" has no more lawful right to redress by his own
" strong arm what he may deem an annoyance
" committed by a railroad employee, than he has to
" visit in like manner any other supposed invasion
" of his convenience or rights. The courts afford
" opportunity to redress every civil injury, no mat-
" ter what its character, and the party must pursue
" the remedy given by law."

These authorities most conclusively show the relative rights and duties devolving upon the passenger and the employees of railroad companies, and might be multiplied almost to infinity; but we deem such a course neither necessary nor proper, as the logic of their reasoning must address itself with such persuasive force to the unprejudiced mind as to render further citation a mere infliction upon the Court.

We submit this branch of the case by reiterating that the plaintiff was himself the aggressor, and actively contributed, and indeed precipitated, the difficulty which culminated in his arrest and expulsion from the train; that any pain of either body or mind suffered by him was the result of his contumacious behavior; that he declared himself chief, and maintained his supremacy until the interposition of the strong arm of the law, and then he immediately presents himself at the bar of the civil courts, demanding reparation for the "outrage" in which he was the principal offender. As was said by Judge Morse in *Galbraith* vs. *Fleming*, 60th Michigan: "The law does not put a premium "on fighting, and one who voluntarily enters "into a quarrel will be afforded no relief for his "own wrong, in damages, if he comes out second "best." Indeed, it is a universal principle in jurisprudence, to which there is no exception, "That no man shall derive a benefit from his "own wrong," but if this judgment were permitted to be enforced this axiom of the law would stand reversed, and a new doctrine established that a person may not only be rewarded for his own perfidy, but the greater the outrage the more substantial the reward.

III.

We come next to the consideration of the instructions of the Court, and, as stated in a former portion of this brief, contend that, whether instructions correctly state the principles of law applicable to the case or not, they are binding upon the jury, and that a verdict contrary to such instructions is a verdict against law.

Emerson vs. *Santa Clara County*, 40 Cal., 545.

Aguirre vs. *Alexander*, 58 Cal., 30.

Declez vs. *Save*, 71 Cal., 553.

Loveland vs. *Gardiner*, 79 Cal., 321.

Bunton vs. *The Orient Insurance Co.*, 4 Bosw., 262.

Flemming vs. *Marine Ins. Co.*, 4 Wharton, 5.

In the case first above cited the Court says :

"It is admitted that the verdict was contrary to "the instructions actually given by the Court, but "it is said that it ought not to be disturbed be- "cause the instruction itself was not correct in "point of law. A verdict of a jury in disobedi- "ence to the instructions of the Court upon a point "of law is a verdict against law within the mean- "ing of subdivision section 193, of the Practice "Act, and for that reason should be set aside with- "out further consideration.

"It matters not if the instruction disobeyed be "itself erroneous in point of law; it is nevertheless binding upon the jury, who can no more be "permitted to look beyond the instructions of the "Court to ascertain the law than they would be "allowed to go outside of the evidence to find the "facts of the case."

In the case of *Aguirre* vs. *Alexander*, 58 Cal., the Court says:

"It is evident that the jury entirely disregarded "this instruction, for they returned a general verdict against the plaintiffs. But it is said that the "verdict is right and the instruction is wrong. The "fact with which we have to deal is that the jury "by their verdict disregarded the instructions of the "Court, and for that reason alone it was the duty of "the Court to set aside the verdict whether the instruction was right or wrong."

("*Ad questionem facti non respondent judices; ad questionem legis non respondent juratores.*") The reason for this rule is well stated in the case of *Flemming* vs. *The Marine Insurance Company*, 4 Wharton (Penn.), as follows:

"They, however, would seem from their verdict "either not to have understood the charge in relation to the want of evidence as to this point, or "to have disregarded it altogether, most likely the "latter. If so, they were clearly wrong, because "they were to receive the law from the Court, and "the Court having advised them in respect to the

" want of evidence as a question of law, they were
" bound by their respective oaths or affirmations to
" have given a verdict according to law and the evi-
" dence, an obligation which they could only fulfill
" by giving a verdict in conformity to the charge of
" the Court, from whom it was their duty to take
" the law when given. If the rule that the jury
" shall receive the law from the Court be not strictly
" adhered to, it is utterly hopeless to expect that the
" law can be administered alike to all, because
" jurors who have never made the law their study,
" as is the case with them all, must necessarily be
" measurably ignorant of it, and will therefore sel-
" dom, if ever, decide intricate causes according to
" it. The rules of property, as also those of civil
" conduct, would be misapprehended and disre-
" garded, so that uncertainty and injustice would
" prevail throughout the State, instead of the law,
" which is certain and fixed, and without a faithful
" observance of which equal justice cannot be ad-
" ministered."

In view of the foregoing authorities, which obviously announce the correct principle, the instructions of the Court must be accepted by the jury as the law of the case without reference to their own views of what the law is, or should be; and a verdict against the instructions of the Court must be construed to be against law, even though the appellate tribunal might doubt their correctness, or in fact repudiate the law as laid down by the Court.

IV.

The damages awarded by the jury were unconscionable and excessive to such a degree as to render the conclusion irresistible, that the verdict was the result of passion or prejudice instead of a fair, candid and dispassionate consideration of the testimony; and, although repudiated by the Court to the extent of nearly thirty thousand dollars, we contend that in no aspect of which the evidence is capable of being viewed, and resolving every hypothesis upon which damages could be awarded under the testimony in favor of the plaintiff, still the judgment is so unreasonably excessive as to fall little short of judicial confiscation.

We have presented in this action for consideration a complaint based wholly upon a violation of a supposed duty, that of a contract of carriage, and damages are claimed for a breach of that contract.

This is the *gravamen* of the action, and the sole and only ground upon which, if true, the plaintiff would be entitled to recover. As a basis for special damages the allegation was also made that, at the time the plaintiff was expelled from the defendant's train, he was proceeding to the city of Portland upon business of great urgency

and importance, and because of his failure to complete his journey speedily he was damaged in the sum of one thousand dollars ($1,000.00); but no evidence was offered upon the trial to support this allegation, nor was there any actual damages attempted to be proven, and the case must rest wholly upon the general averments in the complaint.

It is true that the complaint charges wantonness, malice and oppression upon the part of the agents of the defendant, but these allegations are wholly unsupported by the evidence, and were predicated upon what his counsel and the plaintiff believed were his legal right to transportation, upon the ticket which he held; but as we have already shown by the instructions of the Court, which were binding upon the jury, this right in the plaintiff did not exist, and he was therefore a trespasser upon the train of defendant, to whom it owed no duty, and were wholly justified in expelling him, using no unnecessary force to accomplish that purpose.

If the expulsion of the plaintiff from the defendant's train was wrongful, and either through the negligence of its officers in charge of the train, or their mistaken view of the law governing his rights under the ticket, the plaintiff was compelled to abandon his journey, and was

removed from the car in violation of his rights, then we admit that he would be entitled to recover such actual damages as he had sustained by reason of the wrongful act, which would include actual expenses occasioned thereby, together with injury to his feelings and pain of body and mind for the indignity of being publicly expelled; and in case such removal was conceived and accomplished in a spirit of wantonness, malice or ill will, the jury would not be confined to compensation merely, but might award punitory or vindictive damages as a penalty for the injury inflicted. But neither of these methods for computing damages have any application here, for the reason that the facts in evidence before the jury, and the law as laid down by the Court, eliminated both propositions, and confined their consideration to the fact of excessive force only.

See Instructions, transcript, p. 75.

In this instruction the Court, after defining the rule of damages, both exemplary and otherwise, uses this language:

"And in this connection you must bear in mind "that plaintiff is not entitled to recover any dam- "ages at all, unless you believe from the evidence "that the defendant's agents ejected him from the "car at Lovelocks on account of his refusal to sign "the ticket, pay his fare or leave the train, and in

" so doing *used more force or harsher treatment* than " was *reasonable* or *necessary* to eject him from the " train."

The Court had previously instructed them that the ticket which he presented was not such a ticket as they were bound to honor, and they were justified in removing him from the car, using no excessive force for that purpose.

Hence we insist that the only matter which was left for the jury to consider or estimate damages upon was simply and only excessive force, and in view of the evidence before them their verdict ought to have been regarded as a contempt of Court.

We explore the volumes of adjudicated cases in vain to discover any parallel for this verdict, and it remains for a Nevada jury to place themselves upon the record as either the most ignonorant or vicious that were ever assembled to dispense justice in the United States.

But it is not with this verdict that we are now called upon to contend, but rather with the action of the Court in permitting it to stand for the sum of fifteen thousand dollars. We have already, in discussing other propositions in this brief, had occasion to refer to this subject and point out the fact that from no consistent, reasonable or rational consideration of the evidence

and the law, as laid down by the Court, was the plaintiff entitled to a judgment.

These matters, coming more legitimately under this branch of the discussion, where the subject of damages is considered, we crave the indulgence of the Court for again referring to it, with a view of showing that the judgment for fifteen thousand dollars which the Court, in a somewhat permissive manner, allowed the plaintiff to recover (in deference probably to the verdict of the jury), can neither be justified nor upheld upon any rational conception of the facts of the case, and was doubtless the result of insufficient opportunity on the part of the Court for examination of the testimony, or a misapprehension of the law laid down by it when applied to the facts in evidence.

Excessive force as defined by adjudicated cases is a resort to more violence, or harsher methods, than were reasonable or necessary under a given state of circumstances to accomplish the desired result; and in order to support the judgment in this case it must be that, although the plaintiff was wrongfully on the train, and the agents of defendant were justified in using the force necessary to remove him, they used violent means, or unnecessary methods, to secure such removal, and for this excess they should pay $15,000.

In other words, the action of the defendant's agents in the premises was harsh and unreasonable to such a degree as to render a judgment for this large sum of money a just infliction for the excess used, although a resort to every other method which either ingenuity or patience could suggest had proved abortive, and although the plaintiff had himself resorted to the most desperate and formidable method known to civilization to resist what the Court or jury might deem necessary force, in order to maintain his position on the train.

It really seems to us that it would require more genius than that possessed by the average of mankind to have accurately determined what amount of force less than was actually employed in this case would have succeeded in removing the plaintiff from the train without resort to bloodshed; and, if this be true, must this defendant be mulcted in extraordinary damages because its servants are not gifted intellectually beyond the average of their fellows? In other words, must the agents of a common carrier of passengers who encounter a traveler without any evidence in his possession of his right to be carried, who will neither pay his fare nor peaceably leave the train, and who successfully resists moderate force to expel him, by resort to the use

of a deadly weapon, determine at the peril of the corporation the very best modern and most approved method of accomplishing his expulsion? And in case the one selected, accompanied with no personal violence or injury, is not approved by a jury, is the corporation at the mercy of their prejudice or caprice? Surely, if your Honors please, this cannot be the law.

Other courts of high authority, and perhaps of equal learning and ability with the trial court here, have declared that in cases of this character they would not prosecute the inquiry whether or not the resistance upon the part of the plaintiff might not have been overcome with something less of force than that employed by the agents of the company.

See *Atchison R. R. Co.* vs. *Gantz*, 5 American State Reports, 791.

Hall vs. *Memphis and C. R. R.*, 15 Fed. Rep., 57.

Taylor vs. *Clendenning*, 4 Kansas, 524.

But even if it be admitted for argument's sake that this is a question for the jury, and that the jury had a right to determine in this case whether or not more force was actually used than was necessary, is there anything in the

evidence to justify a verdict for the sum found by the jury, or that allowed by the Court?

As the sum fixed by the jury and the Court are absolutely arbitrary, without any proof of actual pecuniary loss or physical injury, resort must be had to adjudicated cases, analogous in principle, and ascertain the judicial view, and from that determine whether our contention here is not only dictated by reason, but supported by an array of authority so overwhelming that their mere citation would be an imposition on the Court.

Tarbell vs. *C. P. R. R. Co.*, 34 Cal., 23.

In this case the plaintiff was expelled from the train wrongfully, having, under the decision of the Court, a right to be carried. To use the language of his counsel:

> "There was a willful disregard of duty, a willful "breaking of the law, an oppressive, aggravating "outrage, without color of right; there was a gross "insult put upon the plaintiff; his rights were "outraged, his person unlawfully assaulted, and his "feelings willfully and unnecessarily wounded."

The jury returned a verdict for five hundred dollars. The Supreme Court awarded a new trial unless the plaintiff would submit to a reduction to one hundred dollars. The Court, speaking through Mr. Justice Sanderson, said:

"The verdict, however, was excessive; no special "damages were alleged or proved. It is not pre- "tended that this is a case for punitive damages, "or that the business of the plaintiff suffered in "any way by reason of his not being taken to Col- "fax. * * * In short there is no evidence in the "transcript which has any bearing upon the ques- "tion of damages, except the naked fact that he "was put off the cars at a point ten or twelve miles "from his destination, and about five from the "place of his departure. Such being the only evi- "dence bearing upon the question, we think the "verdict greatly disproportionate to the injury "found within the rule in *Aldrich* vs. *Palmer*, 24 "Cal., 513.

"A new trial must be granted unless the plain- "tiff elects within fifteen days to take a judgment "for one hundred dollars, which sum we think "amply sufficient for the injury he sustained."

See, also,

Kinsey vs. *Wallace*, 36 Cal., 463.
Phelps vs. *Cogswell*, 70 Cal., 202.

This latter case was an action for malicious prosecution. The plaintiff was arrested for assault, but was not actually imprisoned. The jury returned a verdict for $7,500. The trial court reduced the judgment to $4,000. The Supreme Court said:

"Under the facts of this case we think the ver- "dict when reduced as above was excessive, and that "it should be reduced to one thousand dollars."

In the case of *Southern Kansas R. R. Co.* vs. *Rice*, 38 Kansas, 398, 5th American State Reports, 766, the plaintiff, who was a passenger on the train, was expelled by the conductor on account of a disagreement over a ticket, and the Court held that the expulsion was illegal and therefore wrongful. The jury returned a verdict for plaintiff for $117.46. The claim was made that these damages were excessive to such a degree as to indicate passion or prejudice, but the appellate court refused to disturb it, saying that the amount of the verdict, in which the jury were entitled to include expenses incurred in litigation, did not justify the inference of passion or prejudice.

In the case of *International & Great Northern R. R. Co.* vs. *Wilkes*, 8 Texas, 617, reported also in 2d American State Reports, 515, a passenger was ejected from the train under circumstances of great hardship, while in the possession of a proper ticket entitling him to ride: the ticket became temporarily mislaid. He informed the conductor that he had a ticket, and that he had exhibited the same to a brakeman upon entering the car. The conductor, in a hasty and petulant manner, discredited his statement, and stopped the train and ejected him at midnight in a lone and desolate country, in which he was compelled

to travel quite a distance to the nearest place of shelter, and from the effects of which he fell ill and required the services of a physician for the space of two weeks. A jury returned a verdict in his favor for $500, which his attorney reduced to $400 upon a charge of being excessive. The verdict was upheld.

In *Pullman Palace Car Co.* vs. *Reed*, 75 Ill., 125, reported also in 20th American State Reports, 232, the plaintiff had purchased a seat or berth in a sleeping-car, but by some misfortune had lost the ticket. He made this statement to the conductor, and also produced a statement from the selling agent that he had in fact purchased the ticket between stations therein designated. All of these assurances were declined by the conductor, who informed the plaintiff that he must either exhibit a ticket, a pass or pay his fare. These conditions being rejected by the plaintiff, and upon his refusal to leave the car the conductor removed his baggage to one of the day coaches, and then laying hands on the plaintiff required him to vacate the sleeper. The jury returned a verdict for $3,000, which the Supreme Court reversed as excessive and awarded a new trial. In passing upon the question of the acts of the conductor the Court pertinently remarked:

"Conceding it to be true, as claimed by counsel "for appellee, that under the circumstances ap- "pellee was improperly ejected from the car, we "fail to discover sufficient evidence that the act "was so willful, wanton or malicious on the part of "the conductor as to require the imposition of se- "vere exemplary damages. Such damages should "in some degree be proportioned to the magnitude "and character of the wrong done. The punish- "ment here does not fall upon the employee, by "whose alleged wrongful act the appellant's lia- "bility is fixed, but upon the stockholders of the "company. There is no evidence that shows that "the conductor had been guilty of previous delin- "quency which had been called to the attention of "appellant's officers, or that they had any knowl- "edge of anything in his character or qualifications "which rendered him unfit for the place he held."

These remarks by the Court are significant in this case, as it is shown by the record that Superintendent Whited and Conductor Derbyshire had been in the employ of the company or plaintiff in error for about twenty years; and no attempt was made to show that either of them were not careful, prudent, trustworthy gentlemen, against whom no complaint had ever been brought home to the officers of the defendant.

See, also,

Chicago & R. I. R. R. Co. vs. *Nickeau*, 40 Ill., 235,
C. B. & Q. R. R. vs. *Parks*, 18 Ill., 460,
Terre Haute R. R. Co. vs. *Vannatta*, 21 Ill., 188,

where verdicts for one thousand dollars for expelling a passenger from the train were held excessive.

In the case of the *C. & N. W. R. R.* vs. *Peacock*, 48 Ill., a passenger who had refused to pay his fare was ejected by the conductor at a point other than a regular station or stopping place, contrary to the statute upon that subject. It was in evidence also that he was bruised and scratched, and he testified himself that he was kicked and hurt. In reviewing a verdict for $1,000, upon the ground that it was excessive, the Court, after showing that he was not confined to his room or rendered incapable of attending to his regular duties, said:

"And when it is remembered that he committed "the first wrong by refusing to pay his fare, and "having proposed to get off if the conductor would "stop the train, and then refused when the train "was stopped, we think one thousand dollars is ex- "cessive, and grossly excessive." Further on the

Court says: "That he suffered indignity and severe "personal injury there is no doubt, but when we "see that he did the first wrongful act, and when "we consider the extent of the injuries inflicted "upon him, we are constrained to say that we re- "gard the verdict as excessive."

"While railroad companies, like individuals, "must be held to the performance of every duty, "they, at the same time, like individuals, are en- "titled to the protection of the law. And, in cases "where they are parties, we will look to the circum- "stances in determining whether damages are ex- "cessive which juries have found against them. "Had this been a verdict against an individual, "under the circumstances it would have appeared "palpably excessive."

In the case of *Toledo, Peoria & Warsaw R. R. Co.* vs. *Patterson*, 63 Ill., 304, the plaintiff was expelled from the train of the defendant, it being a freight upon which, under the rules of the company, recently established, passengers were not allowed to ride, without first procuring tickets for that purpose. The plaintiff neglected to procure a ticket, but offered to pay his fare, which the conductor refused to receive, and when about one-half mile from the station stopped the train and requested plaintiff to get off, which he did.

The jury returned a verdict for $2,100 which the Supreme Court set aside as grossly exces-

sive, and, further, that it was not a case for vindictive damages.

See, also,

C. & N. W. R. R. vs. *Chesolm*, 79 Ill., 584.

In the case of *Chicago & St. Louis R. R. Co.* vs. *Holridge*, 20 N. E. Reporter, 837, where a passenger was wrongfully compelled to pay additional fare under threat of expulsion, in reviewing a verdict for $200.00, which was claimed to be excessive, the Court amongst other things said:

"The rule is that a verdict will not be set aside "on the ground of excessive damages unless they "are such as at first blush appear to be outrageous. "The conductor of appellant's train refused to re- "ceive such ticket, and wrongfully compelled the "appellee to leave the train in order to avoid a "forcible expulsion; the amount assessed does not "at first blush appear to be outrageous. Judgment "affirmed."

This case, and indeed in almost every case which we have been able to find, where damages have been awarded, grew out of facts and circumstances in which the plaintiff was in the right, and the acts of defendant's agents were wrongful; but reversing this contingency, and considering that in the case at bar the plaintiff was not only in the wrong, but guilty of conduct

both mischievous and reprehensible, which would make any judgment in his favor at first blush outrageous, much less a judgment for the sum of $15,000.00.

In the case of *Houck* vs. *Southern Pacific Company*, 38 Fed. Rep., 226, under circumstances of much aggravation the Court refused to sustain a verdict for $5,000.00 upon the ground that it was excessive, and awarded a new trial, unless the plaintiff would remit $2,500.00 from the damages awarded.

See, also, the case of

Missouri Pacific R. R. vs. *Weaver*, 16th Kan., 456.

In this case the plaintiff was rightfully on the train with a ticket entitling him to transportation, and the defendant company and its agents were the wrongful aggressors during the whole controversy.

In response to the special issues submitted to the jury these deductions clearly appear. The plaintiff was expelled from the train under circumstances of great abuse and maltreatment, actually assaulted and beaten by the train agents, although no serious or permanent injuries were inflicted. The jury found a verdict in his favor

for $5,000.00, which was challenged by the defendant upon the ground of being excessive, and the Supreme Court, speaking through Mr. Justice Brewer, now Associate Justice of the Supreme Court of the United States, said:

"Now what may fairly be deduced from this testimony. That there was a sharp scuffle in which three men overpowered one, and ejected him from the cars; that some blows were given, some blood drawn, but no broken limbs or bones, no permanent injury or disfiguration. There was no aggravated insult and abuse, no circumstances of gross outrage independent of the forcible expulsion. There was little loss of time, as the expulsion was within three miles of the place where Weaver entered the cars, and he was taken back there the same day. There was no long confinement, no protracted pain and suffering, no heavy expenses for medicine, nursing or physician. In short, if an individual had committed the assault and battery, a few hundred dollars would have been deemed ample compensation for the injury.

"We know that this is not a parallel case; that there is a special duty on the carrier to protect his passengers, not only against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of its own servants, and that for a breach of that duty he ought to be compelled to make the amplest reparation.

"The law wisely and justly holds him to a strict and rigorous accountability. We would not in

" the slightest degree relax this strict accountability.
" We know that in the case of *Goddard* vs. *The*
" *Grand Trunk R. R. Co.*, 57 Maine, 202, where the
" Supreme Court of Maine discussed the obligations
" and liabilities of railroad companies in an opin-
" ion of great ability, and with an exhaustive ex-
" amination of authorities (and with the general
" conclusions of which we heartily agree), a verdict
" for $4,850.00 was sustained, where there was no
" actual battery, but only a gross, outrageous and
" protracted assault.

" But the circumstances of that outrage were so
" wanton, so vilely abusive, as perhaps to justify
" the verdict. Here the expulsion may have been
" wrongful, but it does not seem to have been wan-
" ton or excessively cruel. We are constrained
" therefore to believe that this verdict was excessive,
" and the jury in their anxiety to punish the com-
" pany for its wrong have failed to adminster equal
" and impartial justice between it and its passen-
" gers."

In the case referred to from Maine, where a judgment for $4,850.00 was sustained by a divided court, the circumstances of the assault were grossly malicious and cruel. The passenger, who was aged and infirm, and who had previously surrendered his ticket to the particular servant that made the attack upon him, was abused, maltreated and assaulted in the most vile and contemptuous manner, by a ruffianly brakeman, who threatened to murder him, and

by every manner of indignity which malice or wantonness could suggest subjected the plaintiff, an innocent victim, in the presence of a crowded car, to a most unprovoked and dastardly outrage. We most cheerfully acquiesce, not only in this judgment, but in the very able and scholarly opinion of Judge Walton, in reasoning out the conclusions which he arrived at in that case.

We are not here assuming the role of apologists for lawlessness, or seeking in the slightest degree to palliate or excuse a violation of personal rights. On the contrary we invite the closest scrutiny, are willing to be relegated to the domain of severest criticism and strict construction, and tested in this crucible we confidently assert that in the light of the evidence in this case, and the law laid down by the Court, the judgment should have been for the defendant.

In no case which we have, by diligent research and consummate industry, been able to find, has any court attempted to reward a wrongdoer and punish his victim as has thus far crowned the efforts of the plaintiff at the bar. If the prosecution of the action had been the result of a conspiracy, in which Hamilton and the twelve jurors who tried the cause were jointly interested, the verdict could scarcely have been more

palpably absurd than the one which they returned to the Court; and while we do not propose to antagonize the line of precedents which justify and authorize courts to compel litigants to remit a portion of their verdicts as conditions precedent to the granting of a new trial, we do think that when a verdict is so clearly monstrous and outrageous as this, where the Court felt compelled to interfere and emasculate it to the extent of $30,000.00, that it ought not to have been permitted to enter into the calculation, or form the basis for any judgment whatever. It was so clearly the result of passion or prejudice as to be unerring proof of the bias and disqualification of the jury to try the cause, and in such cases we believe the better rule to be the one adopted by the Texas courts,--to award *a venire facias de novo*. Any other rule is a denial of justice. While confessing that the verdict is wrong and the offspring of bias, passion, hatred and ill will, it is nevertheless, in a somewhat depleted form, thrust upon the outraged litigant with all the form and solemnity of a fair and honest verdict.

That this practice has become thoroughly engrafted upon our jurisprudence we admit, but that it should be followed in cases of gross and manifest injustice we must earnestly and re-

spectfully deny. There is scarcely any rule by which courts are guided which does not admit of an exception, and certainly none addresses itself stronger to the judicial mind than that which convinces the reason of a Court that a suitor before it has been denied equal and exact justice, and has been rendered a victim to ignorance or ill will as the result of an issue submitted to a jury.

In conclusion, we submit that the judgment in this case is neither supported by the law nor the evidence; that the plaintiff was a trespasser upon the train of the defendant; that the ticket which he held was one which the conductor could not honor under the rules of the company, which were binding upon him; that the plaintiff would neither sign his ticket, pay his fare or leave the train; that he defeated all attempts to remove him by force, and drove the conductor from the train at the point of his pistol; that the agents of the defendant were justified in seeking the protection of the law, which they did, and the plaintiff's arrest was brought about by his own infraction of the written law; that he was an original wrongdoer, unyielding either to reason or persuasion, audacious, defiant and belligerent in his refusal to accede to the demands of the conductor, which are shown to have been both

lawful and reasonable; that he was neither physically injured nor embarrassed in business, and from no aspect is he entitled to any damages at the hands of this defendant.

Very respectfully submitted,

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